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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. EFRAIN SALVADOR PINEDA, Defendant and Appellant.	G052804 (Super. Ct. No. 14NF5034) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W. Michael Hayes, Judge. Affirmed.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Allison V. Hawley, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Efrain Salvador Pineda was convicted of a felony for unlawfully driving or taking a vehicle under Vehicle Code section 10851.[1] He contends his conviction must be reduced to misdemeanor petty theft, but we disagree and affirm the judgment.

FACTS

On the morning of December 3, 2014, Melissa Estavillo left her apartment and went outside to her 2000 Chevy Silverado pickup truck. She started the vehicle and was prepared to depart for work when she realized she had left her cell phone in her apartment. So, she turned off her truck – leaving the keys in the ignition – and returned to her apartment to get her phone. Two minutes later, she returned to see someone driving off in her truck. She called the police.

A short time later, Buena Park Police Sergeant Michael Galos spotted appellant driving Estavillo's truck. Appellant made eye contact with Galos and stepped on the gas. After a lengthy high-speed chase, he crashed into another vehicle and was taken into custody.

Appellant did not offer any evidence in his defense. The jury convicted him of unlawfully driving or taking a vehicle (§ 10851, subd. (a)) and recklessly evading the police (§ 2800.2). After appellant admitted having served multiple prior prison terms, the trial court sentenced him to five years and eight months in prison. That term included a two-year sentence for violating section 10851.

DISCUSSION

Appellant does not dispute there is substantial evidence to support his conviction for violating that section. However, he argues the conviction must be reduced to a misdemeanor because the prosecution failed to prove his conduct was outside the scope of Proposition 47. We disagree.

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[1] Unless noted otherwise, all further statutory references are to the Vehicle Code.

Proposition 47 was passed and became effective in November 2014, roughly one month before appellant's crimes occurred. The measure "'makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors).' [Citation.]" (*People v. Morales* (2016) 63 Cal.4th 399, 404.)

Importantly, however, Proposition 47 did not replace or amend the crime at issue here, unlawful driving or taking a vehicle under section 10851, subdivision (a) (section 10851(a)). Thus, as it did at the time of appellant's crimes, that section continues to provide, "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title or possession of the vehicle, whether with or without intent to steal the vehicle" shall be punished by a fine, a year in jail, or up to three years in state prison. (*Ibid*.) The prosecution was therefore within its rights in charging appellant with violating this provision, even though his crimes occurred after Proposition 47 was enacted. (See generally *People v. Wilkinson* (2004) 33 Cal.4th 821, 838-839 [absent discriminatory intent, it is the prosecutor's prerogative "to charge under one statute and not another"].)

Appellant does not seem to have a problem with that. In fact, he never once raised a Proposition 47 objection to his prosecution, conviction or sentence in the trial court. However, he now maintains that in post-Proposition 47 cases such as his, violations of section 10851(a) must be treated as misdemeanors unless the prosecution establishes – and the jury expressly finds – the value of the subject vehicle exceeded $950. That dollar figure comes from Penal Code section 490.2, which was added to the Penal Code pursuant to Proposition 47 and states as follows: "Notwithstanding [s]ection 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine

hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor[.]" (Pen. Code, § 490.2, subd. (a).)

Appellant's argument is based on the assumption that violations of section 10851(a) are necessarily a form of theft within the meaning of Penal Code section 490.2. That assumption is incorrect. As our Supreme Court has explained, section 10851(a) *can* be violated by means of theft, when, for example, the defendant takes the subject vehicle with the intent to permanently deprive the owner of possession. (*People v. Garza* (2005) 35 Cal.4th 866, 871, 876.) That is why section 10851(a) is sometimes referred to as a "theft" statute. (See, e.g., *In re D.B.* (2014) 58 Cal.4th 941, 944 [describing the defendant's violation of section 10851(a) as "vehicle theft"].)

But, by its terms, section 10851(a) does not require a taking; rather, the statute can be violated merely by driving a vehicle *after* the initial taking is complete, which is not a form of theft. (*People v. Garza, supra*, 35 Cal.4th at p. 871.) Section 10851(a) can also be violated when the defendant's intent is merely to *temporarily* deprive the owner of his or her vehicle, which is inconsistent with the commonly understood meaning of theft. (See *People v. Butler* (1967) 65 Cal.2d 569, 572-573, overruled on other grounds in *People v. Tufunga* (1999) 21 Cal.4th 935 [theft requires the specific intent to "deprive an owner permanently of his property"].) Consequently, even if the value of the vehicle at issue is $950 or less, a violation of section 10851(a) is not necessarily a crime of theft under section 490.2.

In this case, the jury was instructed that to prove a violation of section 10851(a), the prosecution must show "one, the defendant took or drove someone else's vehicle without the owner's consent; and, two, when the defendant did so, he intended to deprive the owner of possession or ownership of the vehicle for any period of time." Although the prosecution theorized in closing argument that appellant was the person who took Ms. Estavillo's pickup truck, there was no direct evidence of that, and it is impossible to tell from the jury's verdict whether it convicted appellant on that basis.

The evidence and verdict also fail to establish whether appellant took or drove the vehicle with the intent to *permanently* deprive Estavillo of the vehicle. Therefore, we are unable to conclude appellant's conduct falls within the definition of misdemeanor petty theft set forth in Penal Code section 490.2.

That being the case, appellant was properly convicted of, and punished for, a felony violation of section 10851(a). The prosecution was not required to prove the value of Estavillo's truck exceeded $950, nor was the trial court required to instruct the jury on that issue.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.